INDEX

Page

I. Motion to Dismiss or Affirm 1

II. Statement of the Facts of the Case 5

III. Brief of Argument 10

1. The question of jurisdiction which the statute permits to be certified to the Supreme Court directly must be one involving the jurisdiction of the District Court as a Federal Court and not simply its general authority as a judicial tribunal 10

Bien v. Robinson, 208 U. S. 424, 52 L. Ed. 556 14

Courtney v. Pradt, 196 U. S. 89, 49 L. Ed. 398 13

Louisville Trust Co. v. Knott, 191 U. S. 224, 48 L. Ed. 159 14

2. The Supreme Court has no jurisdiction of a direct appeal from the District Court to review an order directing the restoration to the trustee in bankruptcy of property which had been taken from the custody of the court after bankruptcy 10

Lucius v. Cawthorn-Coleman Co., 196 U. S. 149, 49 L. Ed. 425 14

Schweer v. Brown, 195 U. S. 171, 49 L. Ed. 144 13

3. On a proceeding for contempt of Court for refusal to comply with a prior order of the Court, which prior order has become final, the Court will not again consider the defenses raised to the original order, but will consider only the present ability of the contemnor to comply with the order theretofore made 15

Carey v. H. & T. C. Railway Co., 150 U. S. 170, 37 L. Ed. 1041 15

Frederick v. Silberman, 250 Fed. 75, 162 C. C. A. 247 16

In RE: Home Discount Co., 147 Fed. 538 16

In RE: Lans, 158 Fed. 610, 85 C. C. A. 432 16

In RE: Strobel, 163 Fed. 380 16

INDEX—Continued.

Page

Stevirmac Oil Co. v. Dittman, 245 U. S. 210, 62 L. Ed. 248 15

4. Petition for certiorari involving the identical questions here sought to be presented by the same parties, having heretofore been denied by this Court, the parties will not be permitted to present again the same questions by appeal 16

Brown v. Alton Waterworks Co., 222 U. S. 323, 56 L. Ed. 221 17

Carter v. Roberts, 177 U. S. 495, 44 L. Ed. 861 17

Farmers & Mechanics National Bank v. Wilkinson, 68 L. Ed. 388 16

Seney v. Swift & Co., 260 U. S. 146, 67 L. Ed. 176 17

5. In order to maintain the jurisdiction of the Supreme Court of a direct appeal from the District Court, the record must show that the Court below sends up for consideration a single and definite question of jurisdiction, that is, of the jurisdiction of the Court as a Court of the United States 18

Courtney v. Pradt, 196 U. S. 89, 49 L. Ed. 398 18

Huntington v. Laidley, 176 U. S. 669, 44 L. Ed. 630 18

McLish v. Roff, 141 U. S. 661, 35 L. Ed. 893 18

6. Appellant's so-called constitutional questions, to-wit: that it was denied the right of trial by jury, and that a summary order of the bankruptcy court to restore property belonging to the bankrupt constitutes the taking of property without due process of law, are frivolous 19

The proceedings are in equity and the power of the bankruptcy Court to make the order here complained of has been frequently sustained by this Court 19

Acme Harvester Co. v. Beekman, 222 U. S. 300, 56 L. Ed. 208 12

INDEX—Continued.

Page

Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672.... 20

Bien v. Robinson, 208 U. S. 424, 52 L. Ed. 556..... 14

Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275..... 12

Everrett v. Judson, 228 U. S. 474, 57 L. Ed. 927, 33 Sup. Ct. 568..... 12

Farmers and Mechanics National Bank v. Wilkinson, 295 Fed. 120. Certiorari Denied by this Court, 68 L. Ed. 388..... 12

Louisville Trust Co. v. Cominger, 184 U. S. 18, 46 L. Ed. 413..... 10

Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405..... 10

Taubell Scott-Kitzmiller Co. v. Fox, 68 L. Ed. 415 (Adv. Op.) 10

IV. The appeal should not be transferred to the Circuit Court of Appeals because an appeal from the same decree is already pending in that Court....22

V. Verification of Facts 23

VI. Proof of Service on Appellant of copy of motion, brief and argument and Notice of Submission thereof 24

In the SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1924.

No. 487

FARMERS AND MECHANICS NATIONAL BANK OF FORT WORTH, TEXAS,
Appellant,

vs.

W. W. WILKINSON, TRUSTEE OF THE WALKER GRAIN COMPANY, BANKRUPT,
Appellee.

APPELLEE'S MOTION TO DISMISS OR AFFIRM.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now W. W. Wilkinson, Trustee of the Walker Grain Company, bankrupt, appellee herein, by his counsel, and respectfully moves the Court to dismiss with costs the appeal taken herein by the above named Farmers & Mechanics National Bank of Fort Worth, Texas, or to affirm said cause with damages for delay; and as grounds of said motion respectfully represents to the Court:

I.

THAT THIS HONORABLE COURT HAS NO JURISDICTION OF THIS APPEAL.

II.

IT IS MANIFEST THAT THE APPEAL WAS TAKEN FOR DELAY ONLY AND THAT THE QUESTIONS UPON WHICH THE DECISION OF THE CAUSE DEPEND ARE SO FRIVOLOUS AS NOT TO NEED FURTHER ARGUMENT.

PREFATORY STATEMENT.

This is a direct appeal to this Court from a decree of the District Court for the Northern District of Texas, sitting in Bankruptcy, assessing a fine as for contempt of court upon the appellant bank for refusing to comply with a summary order formerly made by the Bankruptcy Court requiring the bank to restore certain funds to the trustee in bankruptcy, transferred to appellant after the filing of the petition in bankruptcy, which former order had been affirmed by the Circuit Court of Appeals for the Fifth Circuit, and petition for certiorari to said Court denied by this Court. The certificate of the District Court allowing this appeal certifies not only the jurisdictional question claimed to be involved in respect to the entry of the contempt order; but raises as well alleged matters of defense to the former order, based upon issues of fact and refers to the entire record of the proceedings relative to the former order, as well as the record in the instant case. It is further contended by appellant that the making of the summary order in the first instance and the subsequent attempt to enforce it by assessing a penalty for contempt, deprived appellant of its constitutional right to a trial by jury, and would constitute a taking of its property without due process of law.

FIRST GROUND IN SUPPORT OF MOTION.

The District Court of the United States, as a court of bankruptcy, had jurisdiction to make the summary order

requiring the appellant to restore certain funds to the trustee in bankruptcy, which the Court found to be assets of the bankrupt estate; and also had jurisdiction to assess a fine for contempt of court against appellant for its refusal to comply with said order. Wherefore this appeal does not involve the jurisdiction of a court of the United States as such.

SECOND GROUND IN SUPPORT OF MOTION.

The propriety of this appeal should be considered only as to the jurisdictional question (if any) arising in the particular case before the court—which was a decree imposing a fine for contempt of court; and alleged defenses to the former order, which had passed to final judgment, should not have been certified.

THIRD GROUND IN SUPPORT OF MOTION.

The question of the jurisdiction of the Referee in bankruptcy and the bankruptcy court to make the summary order in the first instance was upheld by the Circuit Court of Appeals upon a review of the question, and petition of certiorari was denied therein by this Court. Wherefore this appeal is in part an attempt to have this Honorable Court pass upon questions heretofore properly presented and adjudicated.

FOURTH GROUND IN SUPPORT OF MOTION.

The District Court overruled the plea to the jurisdiction of the court, passed upon the merits of the case, and has certified not only the jurisdictional question attempted to be raised but has certified the whole case upon its merits, together with the record thereof, which would require an analysis of such record by this Honorable Court, and a decision upon the facts.

FIFTH GROUND IN SUPPORT OF MOTION.

This appeal is sought to be justified also upon the ground that the entry of the summary order in the first instance and the attempt to enforce it by assessing a penalty for contempt, deprived the appellant of its constitutional right to a trial by jury; and constituted a taking of its property without due process of law. In the premises these questions are frivolous, do not require argument, and are clearly raised for the purpose of delay only.

PRAYER.

WHEREFORE, appellee respectfully moves the Court to dismiss said appeal with costs, or to affirm the decree of the District Court herein, and assess against appellant damages for delay.

Respectfully submitted,

GEORGE M. CONNER,
CAPPS, CANTEY, HANGER & SHORT,
MARK MCMAHON,
BOYKIN & RAY,
Atorneys for Appellee.

Mark McMahon

Fort Worth, Texas.

ORESTES MITCHELL,
of St. Joseph, Mo.,
Of Counsel

STATEMENT OF THE CASE.

On July 27th, 1918, the Walker Grain Company, a corporation which afterwards became the bankrupt, borrowed from the American National Bank of Fort Worth, Texas, ten thousand dollars, ($10,000.00) for which it executed to the bank its demand note. On August 16th, 1918, a petition in bankruptcy was filed against the Walker Grain Company, and it was thereafter adjudicated a bankrupt as of that date.

In November, 1918, after the petition in bankruptcy had been filed the bankrupt paid the principal and interest of said note to said bank.

About the first of January following, the said American National Bank consolidated with and was taken over by the appellant herein, the Farmers & Mechanics National Bank, and the combined banks were thereafter known as the Farmers & Mechanics National Bank. According to the findings of fact of the Referee in bankruptcy, which were approved by the District Court, the appellant bank took over all the assets of the American Bank and became responsible for all its liabilities.

Upon the appointment of a trustee in bankruptcy, the appellee herein, he filed a motion before the Referee setting up the aforesaid facts and praying that the appellant bank be required summarily to restore to him such trustee the amount of said payment.

The appellant bank, upon due notice, appeared and answered to the motion, pleading specially that the Referee had no jurisdiction in the premises and that the trustee should be required to proceed by a plenary suit where a trial by jury might be had. It was not contended that such suit would have to be instituted in a state court. In its answer the bank also pleaded to the merits, setting forth, among other things, that the said note was secured

by property of the bankrupt and that the payee bank was entitled to a priority of payment.

The Referee heard evidence and found as a fact that the note was in no manner secured by any property of the bankrupt, but was secured only by liberty bonds which were registered in the name of J. L. Walker, the president of the bankrupt corporation, and claimed by him to be his individual property, and that said bonds were thereafter surrendered by said bank to said Walker who took them to his own use and benefit.

The Referee concluded that the bank had no color of right to said moneys so paid after the jurisdiction of the bankruptcy court had attached to the bankrupt estate by the filing of the petition in bankruptcy, and entered an order requiring the bank to pay the money to the Trustee.

On review to the District Court the findings and conclusions of the Referee were approved and an order of the District Court entered to like effect.

From the order of the District Court the bank took an appeal and also filed a petition to superintend and revise to the Circuit Court of Appeals for the Fifth Circuit. In both proceedings the points were raised respecting the summary jurisdiction of the Referee, and that the proceedings violated the bank's constitutional right to trial by jury, and constituted a taking of its property without the process of law.

The Circuit Court of Appeals affirmed the order of the Referee and of the District Court. In Re Walker Grain Company, Farmers & Mechanics National Bank vs. Wilkinson, 295 Fed. 120.

To correct this opinion and decision the bank filed a petition for certiorari to this Honorable Court. In this petition the bank raised the question of jurisdiction of

the Referee to make the order, and also the question of its right to trial by a jury and made the contention that the order had the effect of taking its property without due process of law. This petition was denied. See docket of this Court, Farmers & Mechanics Natl. Bank vs. Wilkinson, No. 828, Oct. term, 1923. (68 L. Ed. 388, adv. op.)

Upon the denial of the petition for certiorari the mandate of the Circuit Court of Appeals was returned to the District Court. The Referee ordered the bank to comply with the mandate, and upon the bank's refusal to do so, certified the matter to the District Court for appropriate action. At the same time the Trustee filed a motion to the District Court praying that the bank be compelled to comply with the mandate.

Upon due notice to the bank the District Court heard the matter as presented by the certificate of the Referee and the motion of the Trustee. The bank appeared and filed a lengthy answer with affidavits of the president and cashier, respectively, of the bank, attached. In its answer the bank reiterated the defenses that it had originally urged before the Referee and the District Court when the order was first made, and in addition thereto, for the first time in any of the proceedings, set up that the pleadings of the Trustee and the evidence before the Referee on the original hearing did not justify the findings of fact that the appellant bank consolidated with the American National Bank, took over its assets and became responsible for its liabilities. The affidavits of the officers of the bank, above mentioned stated in substance that the appellant bank did not receive the particular fund that was paid over to the American National Bank by the bankrupt, but admitted that the appellant bank absorbed the American Bank and came into possession of all of its assets. Upon the issue thus tendered the District Court found adversely to the appellant bank and rendered the following decree:

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS,
AT FORT WORTH.

In Re:
Walker Grain Company, No. 1001 In Bankruptcy.
Bankrupt.

In the Matter of Show Cause Order against the Farmers & Mechanics National Bank of Fort Worth, Texas.

On this 3rd day of May, A. D. 1924, there coming on to be heard after due and proper notice, an order to the Farmers and Mechanics National Bank of Fort Worth, Texas, to show cause why it should not be adjudged in contempt of Court for refusing to comply with an order heretofore made by the referee in bankruptcy directing said bank to pay unto W. W. Wilkinson, Trustee in Bankruptcy of the Walker Grain Company, the sum of $1650.00 with interest thereon at the rate of six per cent per annum from October 11th, 1918, to this date, and the sum of $8560.00 with interest thereon at the rate of six per cent from the 2nd day of November, 1918, to this date.

And all parties being present before the Court by representative and by counsel, and the Court having heard the answer of the respondent bank, and the motion to strike out said answer presented by the petitioner and trustee in bankruptcy, the Court is of the opinion that the motion to strike out said answer should be and the same is hereby overruled. The said bank thereupon offered to prove each and all of the allegations contained in its said answer, which the Court denied, and to which ruling of the said Court the said bank then and there excepted.

The Court being advised of the answer and taking judicial knowledge of the proceedings heretofore had, in this Court and in the Honorable Circuit Court of Appeals for the Fifth Circuit in which said summary order has been considered, is of the opinion that the said bank is in contempt of Court in refusing to comply with said order.

It is therefore ordered, adjudged and decreed by the Court that that the said Farmers and Mechanics National Bank of Fort Worth, Texas, a National banking corporation, be and the same hereby is fined the said sums enumerated with interest thereon as heretofore enumerated; the amount of said fine to be payable to the trustee in bankruptcy and to be collected by execution and the amount of said fine or any part thereof so collected to be applied in satisfaction of the said summary order. In addition thereto for its contumacious behaviour in this respect the said bank is fined the additional sum of $2500.00, one half of which shall be payable to the government of the United States, and one-half to the said trustee in bankruptcy.

That the said last named amount shall also be collectable by execution.

It is further ordered that all costs of this proceeding be taxed against said bank.

It is further ordered that the aforesaid executions be stayed for a period of twenty (20) days from this date.

To all of which judgment and decree of the Court the said bank then and there in open Court excepted.

(Signed) Wm. H. Atwell,
United States District Judge.

Filed 3d day of May, 1924."

From which decree of the Court, upon certificate made by the Court, this appeal is prosecuted. *The appellant*

has also taken herein a petition to superintend and revise to the Circuit Court of Appeals for the Fifth Circuit, the same being cause No. 4378 on the docket of said Court, a certified copy of the record in said appeal being filed with this motion.

ARGUMENT.

The FIRST GROUND of the motion to dismiss is that the bankruptcy court, acting through its referee, had jurisdiction to enter the summary order; and that subsequently the bankruptcy court had jurisdiction to assess a fine as for contempt of court against appellant for its refusal to comply with it, and that the jurisdiction of a court of the United States, as such, is not in issue.

While it may be beside the point to argue that the bankruptcy court had jurisdiction to enter the summary order against appellant as that matter has been finally determined by the Circuit Court of Appeals and this Honorable Court in this case; yet we will call attention to a well-settled line of authorities on this question, namely:

Mueller vs. Nugent, 184 U. S. 1; 48 L. Ed. 405.

Louisville Trust Company v. Cominger, 184 U. S. 18, 46 L. Ed. 413.

Taubel-Scott-Kitzmiller Co. vs. Fox Adv Op., May 1, 1924, page 415; 68 L. Ed. 415.

In the case of Mueller vs. Nugent, supra, certain moneys claimed by the trustee in bankruptcy, Mueller, to belong to the bankrupt estate, came into the possession of Nugent, a brother of the bankrupt, **prior** to the filing of the petition in bankruptcy. A rule to show cause why he should not summarily pay over the money to the trustee was entered against Nugent by the referee in bankruptcy. Nugent appeared and claimed the money as his individual property. The referee entered a turn-over order against him, which he refused to obey, and the bankruptcy court ordered him imprisoned until he obeyed the order.

It will be noted that in this case the transfer of the moneys was made to Nugent before the petition in bankruptcy was filed, and not after the filing of such petition, as in the instant case. Yet the Court said in passing upon the matter upon certiorari:

> "We think the referee has the power to act in the first instance in matters such as this, when the case has been referred, and in aid of the court of bankruptcy, and exercises in such cases much of the judicial authority of that court. By petition for review that matter can be carried to the bankruptcy court, and the entire record and findings laid before that tribunal, as was done here.
>
> And if the order of October 16th was in itself a lawful order, the power of the District Court to commit William T. Nugent until he surrendered the money to the trustee, or otherwise satisfied the trustee with respect thereto, was unquestionable under the express provisions of the bankruptcy act in that behalf, as well as the general jurisdiction of the court to enforce its order in the collection of assets."

But it is claimed by the appellant bank in the instant case, that it was an adverse claimant of the fund in question, and that the assertion of such claim deprived the referee of all jurisdiction to entertain the matter, and that the trustee should have resorted to a plenary suit. This contention is fully answered by the Court in the case last above quoted, as follows:

> "But suppose that the respondent had asserted that he had the right to possession by reason of a claim adverse to the bankrupt, the bankruptcy court had the power to ascertain whether any basis for such claim actually existed at the time of the filing of the petition. The court would have been bound to enter upon that inquiry, and in doing so would have undoubtedly acted within its jurisdiction, while

> its conclusion might have been that an adverse claim, not merely colorable, but real even through fraudulent and voidable, existed in fact, and so that it must decline finally to adjudicate upon the merits. **If it erred in its ruling either way its action would be subject to review."**

Which was precisely the case at bar. The referee decided that the appellant bank had no "color of right" to the fund in question transferred to it after the filing of the petition in bankruptcy.

It is now settled beyond controversy, by the decisions of this Court, that the filing of the petition in bankruptcy places all property of the bankrupt potentially in the custody of the bankruptcy court, and no one to whom the property is transferred after that time can be an adverse claimant thereof so as to divest the bankruptcy court through its referee of the power to enter a summary order to compel the surrender of the property.

Acme Harvester Co. vs. Beekman, 222 U. S. 300; 32 Sup Ct. 96; 56 L. Ed. 208.

Everett vs. Judson, 228 U. S. 474; Sup Ct. 568, 57 L. Ed. 927.

Bailey vs. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50; 60 L. Ed. 275.

The Circuit Court of Appeals in the case at bar, following the last above cited cases held the same thing, saying in its opinion: In Re Walker Grain Co., Farmers & Mechanics National Bank vs. Wilkinson, 295 Fed. 120:

> "We understand it to be well settled that, as to the bankrupt's property, the hands of the bankrupt and of his creditors are stayed from the date of the filing of the bankruptcy petition, and that his estate then passes actually or potentially into the control of the bankruptcy court. Acme Harvester Co. vs. Beekman, 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208; Everett

vs. Judson, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927; 46 L. R. A. (N. S.) 154; Bailey vs Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275. *There is no color of right in the bank to retain money received by it from the bankrupt under the circumstances disclosed by the referee's findings, and the payment to the trustee of the amount so acquired, with interest thereon, may be required by an order in a summary proceeding.* Reed vs. Barnett National Bank, 250 Fed. 983, 163 C. C. A. 233. (Italics ours).

As to the contention that some of the referree's material findings were unsupported by evidence, it is enough to say that the record does not sustain that contention. We are not of opinion that the power of the bankruptcy court to make the order in question was affected or impaired by the circumstances that the above mentioned supersedeas bonds were given, that the sureties on those bonds are liable to the trustee for the amount paid to the bank as above stated, and that there is a pending suit by the trustee to enforce such liability. The bank, which is not a party to any of those bonds, is not entitled to defeat the remedy available against it by reason of the fact that the trustee had, and was seeking to enforce, other remedies against strangers to the bank. It was not disclosed that the trustee has received from any source any part of the amount obtained by the bank above stated." (Italics ours).

In the case of Taubel-Scott-Kitzmiller Co., supra, this court reviews and affirms the decisions above quoted.

That under such circumstances there is no question raised involving the jurisdiction of a court of the United States as such is supported by the following decisions:

Schweer vs. Brown, 195 U. S. 171, 49 L. Ed. 144.

Courtney vs. Pradt, 196 U. S. 89, 49 L. Ed. 398.

Lucius vs. Cawthorn-Coleman Co., 196 U. S. 149, 49 L. Ed. 425.

Bein vs. Robertson, 208 U. S. 424, 52 L. Ed. 556.

Louisville Trust Co. vs. Knott, 191 U. S. 224, 48 L. Ed. 159.

We beg to quote the short opinion in Schweer vs. Brown, supra:

> THE CHIEF JUSTICE: This was a summary proceeding in the district court of the United States for the eastern district of Arkansas, in bankruptcy, requiring the payment to the trustee in bankruptcy of the sum of $2000.00 as part of the assets of the bankrupt's estate. In return to a rule, one of the respondents alleged that he had paid the money over to the other, and denied the jurisdiction of the court. The other, Mrs. Schweer, denied that she had or ever had had any money belonging or due the estate, and denied jurisdiction. The matter was heard before a referee, who made findings of fact and conclusions of law, and ordered the return of the money. It was then carried to the district court and there heard de novo. The district court sustained the referee, and entered decree for the payment of the money to the trustee. Thereupon an appeal was taken directly to this court on the ground that the case fell within the first of the classes of cases enumerated in sec. 5 of the judiciary act of March 3, 1891, (26 Stat at L. 827, chap. 517, W. S. Comp. Stat. 1901, p. 549). But that class only includes cases where the question is as to the jurisdiction of courts of the United States as such, and the question has to be certified. That was not the question raised here, and none such was certified. *And it is settled that the district court had jurisdiction to determine whether any adverse claim to the money was asserted at the time the petition was filed.* Mueller vs. Nugent, 184 U. S. 1, 46 L. Ed.

405, 22 Sup. Ct. Rep. 269; Louisville Trust Co. vs. Comingor, 184 U. S. 18, 46 L. Ed. 413, 22 Sup. Ct. Rep. 293. (Italics ours).

If the court erred in retaining jurisdiction on the merits, the remedy was by petition to the circuit court of appeals, under 24b of the bankruptcy law (30 Stat. at L. 553, chap. 541, U. S. Comp. 1901, p. 3432). Holden vs. Stratton, 191 W. S. 115, 48 L. Ed. 116, 24 Sup. Ct. Rep. 45.

Appeal dismissed."

The point raised in the SECOND GROUND in support of the motion is that the court should have certified only the jurisdictional question claimed to have been involved in the order from which the appeal was taken; and that it was improper to certify to this Honorable Court for determination any alleged matters of defense going to the validity of the original order.

Carey vs. Houston & Texas Central Ry. 150 U. S. 170, 37 L. Ed. 1041.

Stevirmac vs. Dittman, 245 U. S. 210, 62 L. Ed. 248.

In the case of Carey vs. Houston Texas Central Ry., supra, the Court said

"The fifth section of the Act of March 3, 1891, does not authorize a direct appeal to this court in a suit involving the jurisdiction of the circuit court over another suit previously determined in the same court. It is the jurisdiction of the court below over the particular case in which the appeal from the decree therein is prosecuted, that, being in issue and decided against the party raising it, and duly certified justifies an appeal to this court. This suit to impeach the decree of May 4, 1888, and to prevent the alleged plan of reorganization, was a separate and distinct case so far as this inquiry is concerned, from the suit to foreclose the mortgages on the railroad property, and no question of jurisdiction over the fore-

closure suit and the rendition of the decree passed therein can be availed of to sustain the present appeal in this proceeding."

It has been held by the Circuit Court of Appeals in several of the circuits that on a contempt proceeding for refusal to comply with an order of the court, the court will not consider any defenses which were raised to the original order, or could have been raised thereto; but will consider only the present ability of the alleged contemnor to comply with the order.

In Re Lans (2nd Cir.) 158 Fed. 610, 85 C. C. A. 432.
In Re Home Discount Co., 147 Fed. 538 (D. C. Ala.)
Frederick vs. Silverman (3rd Cir.) 250 Fed. 75, 162 C. C. A. 247.
In Re Strobel (D. C. N. Y.) 163 Fed. 380.

The holdings are well summed up by Judge Lacombe in the case of In Re Lans, supra:

"Having failed to secure a review of the order of Dec. 14, 1906, which found that the bankrupt was concealing property and directing him to turn it over to the trustee, he is in no position to question its propriety upon this petition, which brings up only the order adjudging him to be in contempt for failure to comply with the provisions of said order of December 14th."

The THIRD GROUND of the motion, as presented, raises the point that the validity of the original order requiring the restoration of the funds was passed upon by the Honorable Circuit Court of Appeals for the Fifth Circuit on petition to superintend and revise and the constitutional and jurisdictional questions here presented were decided adversely to the appellant. A petition for writ of certiorari was denied therein by this Honorable Court, and said matters have been finally determined. (68 L. Ed. 388).

Ohio Ex Rel Seney vs. Swift & Co., 260 U. S. 146, 67 L. Ed. 176.

Brown vs. Alton Water Company, 222 U. S. 323, 56 L. Ed. 221.

Carter vs. Roberts, 177 U. S. 495, 44 L. Ed. 861.

In the case of Seney vs. Swift & Co., supra, Your Honors said:

> "And we accordingly hold that whenever the suitor might have come here directly from the district court upon the sole question which he chose to controvert in the Circuit Court of Appeals, the judgment of the latter becomes final and we cannot entertain an appeal therefrom."

And the head note in Brown vs. Alton Water Co., supra:

> "A direct appeal will not lie to the Federal Supreme Court under the act of March 3, 1891, to review, as presenting a question of jurisdiction, a decree of the Circuit Court entered pursuant to the mandate of a circuit court of appeals, which had reversed a decree of that court dismissing such bill for want of jurisdiction, since there was an opportunity afforded by the statute to obtain a review of the jurisdictional question in the Supreme Court, either upon a certificate of the circuit court of appeals, or on writ of certiorari to that court."

The Court said in Carter vs. Roberts, supra:

> "The case before us * * * has been regularly heard and gone to judgment in the circuit court of appeals and an application duly made to this court for certiorari has been denied. These prior proceedings cannot be ignored and the cause brought here as if they had not been had."
>
> "When cases arise which are controlled by construction or application of the Constitution of the United States, a direct appeal lies to this court, and

if such cases are carried to the Circuit Courts of Appeal, those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance. (Citing cases). But when the Circuit Court of Appeals has acted on the whole case its judgment stands unless revised by certiorari to or appeal from that court in accordance with the Act of March 3, 1891."

The FOURTH GROUND of the motion presents the question whether this Honorable Court, upon a certificate of the court below allowing a direct appeal to this Court, will consider in any manner the merits of the cause, or will confine its consideration to the sole question of jurisdiction.

Huntington vs. Laidley, 176 U. S. 669, 44 L. Ed. 630.

Courtney vs. Pradt, 196 U. S. 89, 49 L. Ed. 398.

McLish vs. Roff, 141 U. S. 661, 35 L. Ed. 893.

In Huntington vs. Laidley, supra, the Court said:

" • • • the question whether the procedings in any or all of the suits at law or in equity in the state court afforded a defense—either by way of res adjudicata or because of any control acquired by the state court over the subject matter—to this bill in the Circuit Court of the United States, was not a question affecting the jurisdiction of that court, but was a question affecting the merits of the cause, and as such to be tried and determined by that court in the exercise of its jurisdiction. The circuit court of the United States cannot, by treating a question of merits as a question of jurisdiction, enable this court upon a direct appeal upon the question of jurisdiction only, to decide the question of merits, except

in so far as it bears on the question whether the court below had or had not jurisdiction of the cause."

And, as held in Courtney vs. Pradt, supra:

"The record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction; that is, of the jurisdiction of the court as a court of the United States."

Speaking of the proper construction of the Act of March 3, 1891, the Court said in McLish vs. Roff, supra:

"The true purpose of the Act, as gathered from its context, is that the writ of error, or the appeal, may be taken only after final judgment. When that judgment is rendered the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circiut Court of Appeals upon the whole case; if the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this court."

In this connection we desire to call attention to the fact, as mentioned in the statement of the case, that in the instant case the appellant bank has also taken a petition to superintend and revise the whole case to the Circuit Court of Appeals for the Fifth Circuit, and that proceeding is now pending in that court. However, the appeal to this Court was filed first.

The FIFTH GROUND of the motion is to the effect that the constitutional questions attempted to be injected into the case by the appellant, namely: that it was deprived of its constitutional right to a trial by jury; and that to enforce the judgment rendered, would constitute a taking of its property without due process of law, are frivolous and should not be considered.

It is too well settled to require argument, that, all proceedings in bankruptcy, except as to the committing of the act of bankruptcy charged, and whether or not the bankrupt was insolvent, are in equity, and there is no constitutional right to trial by jury. Barton vs. Barbour, 104 U. S. 126, 26 L. Ed. 672.

Nor is there a right to a trial by jury in a matter involving contempt of court, as here. Acts Bankruptcy, Sec. 41, sub. sec. (a) and (b). That courts have the inherent right to punish for contempt for failure to obey their lawful orders, without the interposition of a jury, needs no citation of authority.

Nor is the enforcement of a summary order in bankruptcy imprisonment for debt, as prohibited by the Constitution. Collier on Bankruptcy, (12th Ed.) 694, and cases cited.

Nor does a question here arise under the Fifth Amendment to the Constitution, "That no person shall be deprived of life, liberty or property without due process of law," as claimed by appellant. This proposition, as applied to this case, is wholly frivolous and needs no argument.

The nature of the case was such that the enforcement of the order was principally remedial and designed to secure to the appellee the fruits of his victory in the summary order proceedings; and it was not beyond the jurisdiction of the court to assess a fine against appellant in the amount of the summary order, collectible by execution; and also an additional fine of $2500.00, half of which was payable to the government to vindicate the outraged dignity of the court, and half to the appellee.

Toledo Scale Co. vs. Computing Scale Co., 261 U. S. 399; 67 L. Ed. 719.

Merchants Stock & Grain Co. vs. Board of Trade of City of Chicago (C. C. A., 8th Cir.) 201 Fed. 20, 120 C. C. A. 582 (Aff. Supt. Ct. 223 U. S. 640; 56 L. Ed. 584.

As said by Honorable Chief Justice Taft in Toledo Scale Co. vs. Computing Scale Co., supra:

> "The decree of punishment for contempt in such case is in the discretion of the court whose dignity has been offended and whose process has been obstructed. New Orleans vs. New York Mail S. S. Co., 20 Wall. 387, 22 L. Ed. 354. Certainly it was not an abuse of discretion in this case to impose as a penalty compensation for the expenses incurred by the successful party to the decree in defending its rights in the Ohio court."

And as said in Merchants Stock & Grain Co. vs. Board of Trade, supra:

> "Where the contempt has been both of the court and of the rights of the adverse party, it has been quite frequently the custom to divide the fine between the government and the injured party." Citing Carey Manf. Co. vs. Acme Flexible Clasp Co., 187 U. S. 427; 47 L. Ed. 244; Matter of Christensen Engineering Co., 194 U. S. 458; 48 L. Ed. 1072.

The appeal may be dismissed and a penalty assessed for delay.

As held in Wagner Electric Manufacturing Co. vs. Lyndon, 262 U. S. 225; 67 L. Ed. 961:

> "The case should be dismissed for lack of jurisdiction because the grounds of appeal are frivolous. In a dismissal on this ground a penalty may be imposed just as if upon an affirmance. Deming vs. Carlisle Packing Co., 226 U. S. 102; 57 L. Ed. 140."

The summary order in the case at bar, together with

the fine assessed of $2500, amounts to the sum of $16,335.00.

This appeal should not be transferred to the Circuit Court of Appeals, for the reason that an appeal from the same decree is already pending in that Court.

We are aware of the Act of September 14th, 1922, Revised Statutes Art. 1215-A, Judicial Code Sec. 238-A as added, authorizing the transfer of appeals from the Supreme Court to the Circuit Courts of Appeals where it appears that the appeal was wrongfully taken to this Court. However, we respectfully urge that this Act should not be invoked in the instant case for the reason that, as shown by the Statement of Facts (p. 10), supra), the appellant herein has also taken an appeal from the identical order here complained of, to the Circuit Court of Appeals for the Fifth Circuit, which last named appeal is now pending in that Court.

Inasmuch as that Court will act on the appeal now pending there in due course, there can be no reason to transfer the appeal from this Court to the Circuit Court of Appeals and thus require that Court to determine the identical cause again. Such procedure would in effect cause the Circuit Court of Appeals to entertain two appeals from the same judgment.

Nor is it an answer to say that the Circuit Court of Appeals could dismiss one appeal and act on the other, because this would unnecessarily prolong the litigation. If this case is transferred, the transfer could not be effected in time to place the case so transferred on the docket for submission at the present term of the Circuit Court of Appeals. This would mean that it could not be submitted until the Fall Term, 1925, and would give the appellant another year's delay in complying with the order. Whereas, if this appeal is dismissed or affirmed, then the Court of Appeals will in all probability act on the

appeal taken directly to it at the present term, and thus terminate the litigation.

Having already taken an appeal directly to the United States Circuit Court of Appeals, appellant should not now be permitted to have the appeal to the Supreme Court transferred to the Court of Appeals.

Wherefore, the appellee respectfully prays that this appeal be dismissed with costs and that an appropriate penalty be assessed against appellant for delay.

Respectfully submitted,
GEORGE M. CONNER,
CAPPS, CANTEY, HANGER & SHORT,
MARK MCMAHON,
BOYKIN & RAY,
Attorneys for Appellee.

Mark McMahon

Fort Worth, Texas.
ORESTES MITCHELL,
of St. Joseph, Mo.,
Of Counsel

The State of Texas,
County of Tarrant.

Stanley Boykin, being duly sworn, on oath states that he is one of counsel for the appellee in the above styled and numbered cause and that he has read the above and foregoing motion and the brief, argument and statement of facts appended thereto, and that the matters of fact therein stated are true.

Stanley Boykin

Sworn to and subscribed before me this the 3rd day of Sept., 1924.

Jean Tinsley

Notary Public, Tarrant County, Texas.

My commission expires June 1, 1925.

NOTICE OF SUBMISSION OF MOTION TO DISMISS OR AFFIRM.

Farmers and Mechanics National Bank of Fort Worth, Texas, Appellant,

vs.

W. W. Wilkinson, Trustee of the Walker Grain Company, Bankrupt, Appellee.

To the Farmers and Mechanics National Bank of Fort Worth, Texas, Appellant herein, or Messrs. G. A. Stultz, W. E. Spell, Clay Cooke, J. A. Templeton, Attorneys for said Appellant:

Please take notice that on the annexed verified statement of facts herein and on all the papers and proceedings herein, we shall submit to the Supreme Court of the United States, at a stated term thereof, on Monday, the sixth (6th) day of October, A. D. 1924, at the Capitol in the City of Washington, in the District of Columbia, at the opening of the court on that day, or as soon thereafter as counsel can be heard, the motion to dismiss or affirm of which the foregoing is a copy and that we shall submit with said motion and in support of the same the brief and argument attached to said motion of which the above and foregoing is a copy.

GEORGE M. CONNER,
CAPPS, CANTEY, HANGER & SHORT,
MARK MCMAHON,
BOYKIN & RAY,
Attorneys for Appellee.

Mark McMahon

Fort Worth, Texas.

The State of Texas,
County of Tarrant.

H. C. Ray, being duly sworn on oath, states that he is one of counsel for the appellee in the above styled and

numbered cause and that on the 3rd day of Sept., A. D. 1924, he delivered to J. A. Templeton, one of counsel for the appellant herein, a true copy of the above and foregoing motion to dismiss or affirm, and brief and argument thereon together with the above notice of submission of the said motion in the Supreme Court of the United States.

H. C. Ray

Sworn to and subscribed before me this the 3rd day of Sept, 1924.

Jess Tucker

Notary Public, Tarrant County, Texas.

My commission expires June 1, 1925

NOV 24 192
WM. R. STANSB
CL

In The

Supreme Court of the United States

OCTOBER TERM, 1924

—o—

No. 487

—o—

FARMERS AND MECHANICS NATIONAL BANK OF FORT WORTH, TEXAS, *Appellant*,

vs.

W. W. WILKINSON, TRUSTEE OF THE WALKER GRAIN COMPANY, BANKRUPT, *Appellee.*

—o—

Appellee's Additional Argument on Motion to Dismiss or Affirm

—o—

GEORGE M. CONNER,
CAPPS, CANTEY, HANGER & SHORT,
MARK MCMAHON,
BOYKIN & RAY,
Attorneys for Appellee.

ORESTES MITCHELL,
Of St. Joseph, Mo.,
Of Counsel.

ROBERTSON, 907 THROCKMORTON STREET—IN THE BASEMENT—FORT WORTH

In The

Supreme Court of the United States

OCTOBER TERM, 1924

—o—

No. 487

—o—

FARMERS AND MECHANICS NATIONAL BANK OF FORT WORTH, TEXAS, *Appellant*,

vs.

W. W. WILKINSON, TRUSTEE OF THE WALKER GRAIN COMPANY, BANKRUPT, *Appellee.*

—o—

Appellee's Additional Argument on Motion to Dismiss or Affirm

—o—

Statement.

It was pointed out to the Court in appellee's original motion to dismiss or affirm that the same questions presented here had been taken by the appellant herein to the Circuit Court of Appeals for the Fifth Circuit on motion to superintend and revise the decree of the District Court, from which decree it has also appealed to this Court. Since the filing of appellee's said original motion to dismiss in this Court, the said petition to superintend and revise has been submitted to the Circuit Court of Appeals on the merits; and every question raised on the

appeal to this Court was raised in said Circuit Court of Appeals by assignments of error, by written briefs, and by oral argument, as shown by certificate of the Clerk of said Court hereto attached, together with certified copy of the record in said proceedings.

PROPOSITION HEREUNDER.

When two proceedings for review are each pending at the same time, one in the Supreme Court, and one in the Circuit Court of Appeals; and the appellant or petitioner, submits the cause on the merits to the Circuit Court of Appeals, he elects to pursue that mode of review, and the proceedings in the Supreme Court should be dismissed.

Authorities.

As said by this Honorable Court in the case of *Robertson v. Caldwell*, 165 U. S. 359, 41 L. Ed. 745:

> "It was not the purpose of the judiciary act of 1891 to give a party who was defeated in a Circuit Court of the United States the right to have the case finally determined upon its merits both in this Court and in the Circuit Court of Appeals. As no question of jurisdiction was certified by the Circuit Court of Appeals, and as the defendant chose not to await the action of this Court upon the appeal to it from the Circuit Court, but invoked the jurisdiction of the Circuit Court of Appeals upon the whole

case, he must be held to have waived his right to any decision here upon his direct appeal from the Circuit Court."

And as was said by this Honorable Court in the case of *McLisk v. Roff*, 141 U. S. 661, 35 L. Ed. 893:

"It is further argued, in support of the contention of the plaintiff in error, that if it should be held that a writ of error would not lie upon a question of jurisdiction until after final judgment, such ruling would lead to confusion and absurd consequences; that the question of jurisdiction would be certified to this Court, while the case on its merits would be certified to the Circuit Court of Appeals, that the case would be before two separate appellate courts at one and the same time, and that the Supreme Court might dismiss the suit upon the question of jurisdiction while the Circuit Court of Appeals might properly affirm the judgment of the lower court upon the merits. The fallacy which underlies this argument is the assumption that the Act of 1891 contemplates several separate appeals in the same case and at the same time in two appellate courts. No such provision can be found in the Act, either in express terms or by implication. The true purpose of the Act, as gathered from its context, is that the writ of error, or the appeal, may be taken only after final judgment, except in the cases specified in section 7 of the Act. When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of

> Appeals upon the whole case; if the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this Court.
>
> "The writ of error is dismissed."

In the case of *Cincinnati H. & D. Ry. Co. v. Theibaud*, 177 U. S. 615, 44 L. Ed. 911, this Honorable Court, quoting from its decision in *Carter v. Roberts*, says:

> "In Carter vs. Roberts, 177 U. S. 496, ante. 861, 20 Sup. Ct. Rep. 713, it was held that when cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this Court, and if such cases are carried to the Circuit Court of Appeals, those Courts may decline to take jurisdiction; or, where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment; or may decide the whole case in the first instance. But when the Circuit Court of Appeals has acted on the whole case, its judgment stands unless revised by certiorari to or appeal from that court in accordance with the Act of March 3, 1891."

While the Honorable Circuit Court of Appeals has not yet rendered its decision in the case, yet the whole case has been submitted to it, and a decision upon the merits is bound to follow.

The cause has not yet been submitted in this Honorable Court on the merits; but is pending here

upon a motion to dismiss or affirm. It is obvious that, under the above decisions, the appellant, by submitting the whole case to the Circuit Court of Appeals, has waived his right to a review in this Court.

* * * * * *

We desire to submit an additional point with reference to the lack of jurisdiction in this Honorable Court to entertain the appeal. This point is patent and arises on the face of the record, viz:

The Supreme Court of the United States has no jurisdiction by either appeal or writ of error, to review the action of a District Court in a contempt proceeding; an appeal or writ of error in such case lies directly to the Circuit Court of Appeals, and the Supreme Court can take jurisdiction only by writ of certiorari from the Circuit Court of Appeals.

Authorities.

This is clearly held by this Honorable Court in the case of *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 48 L. Ed. 997, in which an extensive review of the authorities on this question is made. The Court quotes from earlier cases as follows:

> "Judgments in proceedings in contempt are not reviewable here on appeal or error. Hayes v. Fischer, 102 U. S. 121, 26 L. Ed. 95; Re Debs, 158 U. S. 564, 573, 39 L. Ed. 1092, 15 Sup. Ct. Rep. 900, 159 U. S. 251, 15 Sup. Ct.

Rep. 1039. But they may be reached by certiorari, in the absence of any other adequate remedy. The writ of certiorari will be allowed to bring up the record, so that the order adjudging Chetwood and his counsel in contempt for being concerned in suing out the writs of error, and directing them, or either of them, to refrain from prosecuting the one writ in the name of the bank, and to dismiss the other, may be revised and annulled."

WHEREFORE, appellee respectfully submits the above propositions and authorities and prays that this Honorable Court consider the same.

Respectfully submitted,

GEORGE M. CONNER,
CAPPS, CANTEY, HANGER & SHORT,
MARK MCMAHON,
ORESTES MITCHELL,
BOYKIN & RAY,

Counsel for Appellee.

STATE OF TEXAS,
COUNTY OF TARRANT

Before me, the undersigned authority, on this day personally appeared H. C. Ray, who, being by me first duly sworn, on oath states that he is one of counsel for the appellee in the above styled and numbered cause, and that on the_____day of November, 1924, he delivered a true copy of the above and foregoing brief and argument to Mr.

_____, one of counsel for appellant herein.

_____

Subscribed and sworn to by H. C. Ray, before me, this the_____day of November, 1924.

_____

Notary Public, Tarrant County, Texas.

My commission expires June 1st, 1925.